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10 IN THE UNITED STATES DISTRICT COURT

11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 CESAR RODRIGUEZ, No. 08-03830 CW

13 Petitioner,

14 ORDER REGARDING  
15 PETITION FOR WRIT  
16 OF HABEAS CORPUS

17 v.

18 JIM MACDONALD, Warden,

19 Respondent.

20 Petitioner Cesar Rodriguez, a prisoner of the State of  
21 California incarcerated at the La Palma Correctional Center, Eloy,  
22 Arizona, filed this pro se petition for a writ of habeas corpus  
23 challenging the validity of his State conviction. Respondent filed  
24 an answer with accompanying points and authorities and exhibits, in  
25 which he argued that the Petition should be dismissed for failure  
26 to exhaust.<sup>1</sup> Petitioner has filed a traverse.

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28 <sup>1</sup> Pursuant to Federal Rule of Civil Procedure 25(d), Jim  
MacDonald is substituted for James Schomig, whom MacDonald  
succeeded as Warden after the Answer was filed.

## 1 BACKGROUND

2 On May 5, 2006, Petitioner plead guilty to two counts of lewd  
3 and lascivious acts upon a person under the age of fourteen years.  
4 (Resp. Exh. B2 at 3, 10.)

5 At the sentencing hearing on June 2, 2006, the trial court  
6 found that Petitioner had prior convictions of increasing  
7 seriousness and that the present crime was committed while  
8 Petitioner was on probation. (Resp. Exh. B2 at 24-25.) Based on  
9 these aggravating factors, the trial court sentenced Petitioner to  
10 the upper term of eight years on the first count and a consecutive  
11 term of two years on the second count, for an aggregate term of ten  
12 years in state prison. (Resp. Exh. B2 at 25.)

13 On direct appeal to the California court of appeal, Petitioner  
14 relied on Apprendi v. New Jersey, 530 U.S. 466 (2000), to argue  
15 that the aggravating factors relied upon by the trial court were  
16 facts that had to be submitted to a jury and proved beyond a  
17 reasonable doubt before they could be used to impose an enhanced  
18 sentence. (Resp. Exh. C4 at 2.)

19 The court of appeal affirmed the sentence, and Petitioner  
20 sought review in the California Supreme Court. (Resp. Exh. D1 at  
21 4.) On December 12, 2007, the California Supreme Court denied the  
22 petition for review. (Resp. Exh. D2.) On June 30, 2008,  
23 Petitioner filed this federal petition for a writ of habeas corpus.

## 24 LEGAL STANDARD

25 Prisoners in state custody who wish to challenge collaterally  
26 in federal habeas proceedings either the fact or length of their  
27 confinement are first required to exhaust state judicial remedies,

1 either on direct appeal or through collateral proceedings, by  
2 presenting the highest state court available with a fair  
3 opportunity to rule on the merits of each and every claim they seek  
4 to raise in federal court. 28 U.S.C. § 2254 (b), (c); Rose v.  
5 Lundy, 455 U.S. 509, 515 (1982).

6 The exhaustion-of-state-remedies doctrine reflects a policy of  
7 federal-state comity "to give the state the initial 'opportunity to  
8 pass upon and correct' alleged violations of its prisoners' federal  
9 rights." Picard v. Connor, 404 U.S. 270, 275 (1971)(citations  
10 omitted). The exhaustion requirement is satisfied only if the  
11 federal claim has been "fairly presented" to the state courts.  
12 Id.; Peterson v. Lampert, 319 F.3d 1153, 1155 (9th Cir. 2003)(en  
13 banc). A federal district court must dismiss a federal petition  
14 containing any claim as to which state remedies have not been  
15 exhausted. Rhines v. Webber, 544 U.S. 269, 273-74 (2005).

16 DISCUSSION

17 Respondent argues that Petitioner has filed a "mixed petition"  
18 containing one exhausted claim and four unexhausted claims.  
19 Respondent, therefore, asks the Court to dismiss the petition.  
20 (Answer at 2.) Respondent also argues, on the merits of the  
21 exhausted claim, that it must be denied.

22 In his federal habeas corpus petition, Petitioner first raises  
23 the Apprendi claim, arguing that his right to a jury and his due  
24 process rights were violated when the trial court imposed an  
25 enhanced sentence based on facts not submitted to a jury or proved  
26 beyond a reasonable doubt. (Pet. at 4.) Respondent concedes that  
27 this claim is exhausted. Second, Petitioner alleges ineffective

1 assistance of counsel based on his trial attorney's failure to  
2 explain to him that he could receive a ten year sentence if he  
3 plead guilty. (Pet. at 4.) Third, he alleges that the trial court  
4 violated his constitutional rights by denying his request for a new  
5 attorney. (Pet. at 5.) Fourth, he alleges that the prosecution  
6 violated his constitutional rights by using the victim's perjured  
7 statements. Id. Fifth, he alleges that the trial court erred by  
8 considering prior crimes of which he had only been accused but not  
9 convicted. Id.

10 The latter four claims were not included in his petition for  
11 review in the California Supreme Court.

12 Petitioner claims that in July, 2006 he filed a habeas corpus  
13 petition in California superior court. (Pet. at 4.) Petitioner  
14 alleges that he raised claims one, two, and four in that petition.  
15 Id. Petitioner did not submit a copy of such a petition or of the  
16 court's ruling on it but he did provide a case number. (Pet. at  
17 4.) Respondent indicates that he searched for this petition but  
18 could not find it or any record substantiating Petitioner's claim  
19 that he filed a state habeas corpus petition. (Resp. Exh. E.)<sup>2</sup>  
20 Respondent does not dispute that Petitioner may have filed a  
21 petition in California superior court, but he was unable to find  
22 any record that such a petition was reviewed by the California  
23 court of appeal or the California Supreme Court. The Court has

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25 <sup>2</sup> Exhibit E is a print out of Respondent's search results from  
26 the California courts' website. The website has an online database  
27 cataloging cases filed in the California courts. Respondent  
searched the site using Petitioner's name but did not find any  
record of a habeas corpus petition in the California Court of  
Appeal or the California Supreme Court.

1 found no record of the petition or the case number provided by  
2 Petitioner.

3 Thus, there is no evidence that the California Supreme Court  
4 had a fair opportunity to rule on the merits of claims two, three,  
5 four and five. Petitioner's Apprendi claim, however, was fairly  
6 presented to the California Supreme Court and is an exhausted  
7 claim. Thus, Petitioner has filed a "mixed petition" composed of  
8 one exhausted claim and four unexhausted claims.

9 A district court must dismiss "mixed petitions" containing  
10 both exhausted and unexhausted claims. Rose, 455 U.S. at 522.  
11 Before entering a judgment of dismissal, however, a district court  
12 must provide a petitioner with an opportunity to amend the "mixed  
13 petition" by striking his unexhausted claims. Jefferson v. Budge,  
14 491 F.3d 1013, 1016 (9th Cir. 2005) (citing Rhines, 544 U.S. at 277  
15 (2005)). Alternatively, a court may stay the "mixed petition" while  
16 the petitioner returns to state court to exhaust the unexhausted  
17 claims. Rhines, 544 U.S. at 277.

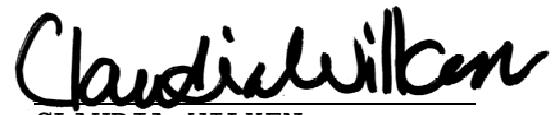
18 Accordingly, Petitioner may chose either to (1) amend his  
19 petition by deleting his unexhausted claims and proceed only with  
20 his exhausted claim or (2) request a stay of his petition while he  
21 exhausts his unexhausted claims in state court. Petitioner is  
22 advised, however, that if he strikes the unexhausted claims and  
23 proceeds only with the exhausted claim, the abuse of writ doctrine  
24 will bar him from raising the unexhausted claims in future federal  
25 habeas proceedings. If Petitioner exhausts his unexhausted claims  
26 by way of a state habeas petition, Petitioner may then return to  
27 federal court on all of his exhausted claims.

1        Within fourteen days of the date of this order, Petitioner  
2 must submit a request to dismiss his unexhausted claims and proceed  
3 with his exhausted Apprendi claim or a request to stay the petition  
4 while he returns to state court to exhaust his unexhausted claims.  
5 If he does neither, the Court will dismiss the petition for failure  
6 to exhaust State judicial remedies.

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8        IT IS SO ORDERED.

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10 Dated: 11/2/2010  
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CLAUDIA WILKEN  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

CESAR RODRIGUEZ,

Plaintiff,

V.

JOHN F SALAZAR et al,

Defendant.

Case Number: CV08-03830 CW

## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on November 2, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located  
in the Clerk's office.

Cesar Rodriguez F-30844  
Suni A202  
La Palma Correctional Center  
5501 N. LaPalma Rd.  
Eloy, AZ 85131

Dated: November 2, 2010

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk